Sime Bank Bhd (formerly known as United Malayan Banking Corp Bhd) v Kuala Lumpur City Securities Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO D5–22–1374 OF 1998
KANG HWEE GEE J
21 SEPTEMBER 2000

Civil Procedure *— Summary judgment — Appeal — Question of law of some complexity — Whether summary judgment can be granted*

Contract *— Terms — Construction of contract — Put option agreement — Whether liability of defendant depends on the enforcement of other put option agreement — Whether agreement should be read in isolation with other put option agreement*

Contract *— Terms — Parole evidence rule — Whether external evidence allowed to add, subtract or vary the agreement — Whether agreement itself conclusive*

This is an appeal against the decision of the registrar dismissing the plaintiffs application for summary judgment under O 14 of the Rules of the High Court 1980. The plaintiffs' claim against the defendant was in respect of the exercise of a put option under a put option agreement. By a facility agreement dated 4 February 1997 ('the facility agreement'), the plaintiff granted to the borrower (Primal Vision Sdn Bhd Sdn Bhd) a term loan facility. The facility agreement was secured, inter alia, by a charge of securities being 47.1m ordinary shares in Parit Perak Holdings Bhd ('the charged securities'), executed by the borrower in favour of the plaintiff. By a put option agreement dated 4 February 1997 ('the put option agreement'), the defendant granted to the plaintiff, an irrevocable put option in consideration of the plaintiff granting the facility agreement to the borrower. Under the put option agreement, the defendant agreed that in the event Primal Vision Sdn Bhd defaulted, it would purchase from the plaintiff the 47.1m Parit Perak Holdings Bhd shares which Primal Vision Sdn Bhd had charged to the plaintiff at the agreed price of RM4.22 per share. Later, the borrower had been unable to pay all monies due and owing to the plaintiff on the due date. Accordingly the plaintiff had exercised the put option to require the defendant to purchase the shares. The defendant had failed to buy back the 47.1m shares in consequence of which the plaintiff was forced under a term of the agreement, to sell them at a much lesser price, thereby incurring a loss of RM155,665,500, the sum the plaintiff is now claiming from the defendant.

The defendant argued that the put option agreement must be read as a 'composite whole' with the other agreements as the facility agreement which Primal Vision Sdn Bhd entered into with the plaintiff was secured by a number of interlocking arrangements/ agreements and hence the defendant's liability under the put option agreement cannot therefore be enforced in isolation but 'back to back'

with the other agreements ie the Kemayan put option and the merit call option. The defendant also argued that plaintiff owed a duty to the defendant to act prudently to realize the charged securities at the best possible price in the light of the downturn in the Malaysian stock market beginning in the month of April 1997.

Held, allowing the appeal:

(1) The put option agreement is a highly formal, properly negotiated and professionally drawn up document by practitioners of law. It imposes upon the defendant the liability to pay out a very large sum of money should the borrower default on the loan and the plaintiff decides to exercise the option. The agreement is conclusive of all the essential terms that would govern their contractual relationship at the time they signed it. Having to exclude such extrinsic evidence, it follows that the parties would have to be bound by the terms embodied within the four corners of the put option agreement read wherever necessary in conjunction with the facility agreement and the charge of securities (see pp 683E, G, I–684A).

(2) Having read the put option agreement and referring where necessary to the facility agreement and the charge of securities, the parties had never intended that the put option agreement, is to be read as a composite whole or back to back with other put option agreement, ie the Kemayan put option, the merit call option or any other agreements which the plaintiff had entered into with any other parties pursuant to the facility agreement. Both the Kemayan put option and the merit call option agreements ride on the back of the present put option agreement. The two agreements become operative upon the put option being exercised by the plaintiff in the put option agreement, but not vice versa. It follows that any corresponding claims that the defendant may have against Kemayan, merit capital or TYK arising from the exercise of the put option by the plaintiff have to be prosecuted and heard in other forums and not in tandem with the instant action by consolidation or otherwise (see pp 684D–E, 685B–E).

(3) The put option agreement does not impose upon the plaintiff the duty to recall the facilities from the borrower and to realize the charged securities when the price per share was at a reasonable level or any level. Even assuming that the plaintiff did owe such a duty to act in the interest of the defendant, the plaintiff could not have in any case acted on the default of the borrower in May 1997 to exercise the put option against the defendant and to realize the charged securities. Under cl 2(a) of the put option agreement, the put option may be exercised by the plaintiff only during the defined option period, ie within a period of one month commencing on the next anniversary date of the facility

agreement — to be exact, only between the period 4 February 1998 and 3 March 1998 (see pp 686F, I–687A).

(4) 'Under an O 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other on affidavit. Apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable. Where the issue raised is solely a question of law without reference to any facts or where the facts are clear and undisputed, the court should exercise its duty under O 14. If the legal point is understood and the court is satisfied that it is unarguable, the court is not prevented from granting a summary judgment, merely because 'the question of law is at first blush of some complexity and therefore takes a little longer to understand'' (*Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400)' (see p 687E–H).

[**Bahasa Malaysia summary**

Ini adalah rayuan terhadap keputusan pendaftar menolak permohonan plaintif-plaintif untuk penghakiman terus di bawah A 14 Kaedah-Kaedah Mahkamah Tinggi 1980. Tuntutan plaintif-plaintif terhadap defendan adalah berkaitan pelaksanaan satu 'put option' di bawah satu perjanjian 'put option'. Melalui satu perjanjian kemudahan bertarikh 4 Februari 1997 ('perjanjian kemudahan tersebut'), plaintif telah memberikan kepada peminjam (Primal Vision Sdn Bhd) satu pinjaman kemudahan bertempoh. Perjanjian kemudahan tersebut telah dijaminkan, antara lain, oleh satu gadaian sekuriti berjumlah 47.1j syer biasa dalam Parit Perak Holdings ('sekuriti yang digadaikan tersebut'), yang dilaksanakan oleh peminjam bagi pihak plaintif. Melalui satu perjanjian 'put option' bertarikh 4 Februari 1997 ('perjanjian 'put option' tersebut'), defendan telah memberikan kepada plaintif, satu 'put option' yang tidak boleh diubah sebagai balasan plaintif memberikan perjanjian kemudahan tersebut kepada peminjam. Di bawah perjanjian 'put option' tersebut, defendan bersetuju bahawa di dalam keadaan di mana Primal Vision Sdn Bhd melakukan kegagalan, ia akan membeli daripada plaintif 47.1j syer-syer Parit Perak Holdings Sdn Bhd yang Primal Vision Sdn Bhd telah gadaikan kepada palintif pada harga yang dipersetujui RM4.22 setiap syer. Berikutan itu, peminjam tidak dapat membayar semua wang yang perlu dibayar dan terhutang kepada plaintif pada tarikh yang sepatutnya. Sewajarnya plaintif telah melaksanakan satu 'put option' yang menghendaki defendan membeli syer-syer tersebut. Defendan telah gagal untuk membeli balik syer-syer 47.1j tersebut di mana akibatnya menyebabkan plaintif terpaksa di bawah satu terma perjanjian, membeli syer-syer tersebut pada harga yang lebih murah, yang mengakibatkan kerugian RM155,665,500, jumlah yang plaintif sekarang ini menuntut daripada defendan.

Defendan telah menghujahkan bahawa perjanjian 'put option' tersebut mestilah dibaca sebagai satu 'composite whole' dengan perjanjian-perjanjian lain kerana perjanjian kemudahan tersebut yang Primal Vision Sdn Bhd telah masuki dengan plaintif telah dijaminkan oleh beberapa penyusunan/perjanjian yang bercantum dan justeru itu liabiliti defendan di bawah perjanjian 'put option' tersebut tidak boleh dikuatkuasakan secara berasingan tetapi secara' back to back' dengan perjanjian-perjanjian yang lain, iaitu 'put option' Kemayan dan 'merit call option'. Defendan juga menghujahkan bahawa plaintif mempunyai kewajipan kepada defendan untuk bertindak dengan berhati-hati untuk merealisasikan sekuriti yang digadaikan tersebut pada harga yang terbaik mungkin dengan mengambilkira kejatuhan pasaran saham di Malaysia yang bermula dari bulan April 1997.

Diputuskan, membenarkan rayuan tersebut:

(1) Perjanjian 'put option' tersebut adalah satu dokumen yang amat rasmi, yang dibentuk atas perbincangan yang teliti dan profesional olah pengamal undang-undang. Ia meletakkan liabiliti ke atas defendan untuk membayar sejumlah besar wang sekiranya peminjam gagal dalam pinjaman tersbeut dan plaintif memutuskan untuk melaksanakan psyen tersebut. Perjanjian tersebut tidak dapat dipertikaikan akan semua terma-terma yang akan mengawal hubungan kontrak mereka pada masa mereka menandatanganinya. Untuk mengecualikan keterangan ekstrinsik sedemikian, ia akan menyebabkan pihak-pihak terikat oleh terma-terma yang terkandung di dalam perjanjian 'put option' tersebut yang dibaca di mana perlu bersama dengan perjanjian kemudahan tersebut dan sekuriti yang digadaikan tersebut (lihat ms 683E, G, I–684A).

(2) Setelah membaca perjanjian 'put option' tersebut dan merujuk di mana perlu kepada perjanjian kemudahan tersebut dan sekuriti yang digadaikan tersebut, pihak-pihak tersebut tidak bermaksud untuk perjanjian 'put option' tersebut, dibaca sebagai satu komposit menyeluruh atau dari mula hingga akhir dengan perjanjian 'put option' yang lain, iaitu Kemayan 'put option', 'merit call option' atau mana-mana perjanjian lain yang telah dimasukimoleh plaintif dengan mana-mana pihak berikutan dengan perjanjian kemudahan tersebut. Kedua-dua perjanjian 'put option' Kemayan dan 'merit call option' tersebut bergandingan dengan perjanjian 'put option' tersebut. Kedua-dua perjanjian tersebut beroperasi apabila 'put option' tersebut dilaksanakan oleh plaintif di dalam perjanjian 'put option' tersebut, tetapi tidak sebaliknya. Oleh itu apa-apa tuntutan yang sama di mana defendan mungkin ada terhadap Kemayan, merit capital atau TYK yang timbul daripada pelaksanaan 'put option' oleh plaintif perlulah dibicarakan dan didengar di dalam forum

yang lain dan tidak bersama-sama dengan tindakan ini melalui penggabungan atau sebaliknya (lihat ms 684D–E, 685B–E).

(3) Perjanjian 'put option' tersebut tidak meletakkan kewajipan ke atas plaintif untuk memanggil balik daripada peminjam dan merealisasikan sekuriti yang digadaikan tersebut apabila harga satu syer adalah pada paras yang munasabha atau apa-apa paras. Walaupun dengan anggapan bahawa plaintif sememangnya mempunyai kewajipan untuk bertindak dalam kepentingan defendan, plaintif tidak boleh dalam apa keadaanpun bertindak atsa kegagalan peminjam pada bulan Mei 1997 untuk melaksanakan 'put option' tersebut terhadap defendan dan untuk merealisasikan sekuriti yang digadaikan tersebut. Di bawah fasal 2(a) perjanjian 'put option' tersebut, 'put option' tersebut boleh dilaksanakan oleh plaintif hanya dalam tempoh yang mendefinasikan opsyen tersebut, iaitu di dalam tempoh satu bulan bermula daripada tarikh ulangtahun perjanjian kemudahan tersebut — secara tepatnya, hanya antara tempoh bulan Februari 1998 dan 3 Mac 1998 (lihat ms 686F, I–687A).

(4) 'Di bawah A 14 permohonan, kewajipan seorang hakim tidak tamat sebaik sahaja satu fakta ditegaskan oleh satu pihak, dan dinafi atau dipertikaikan oleh pihak yang satu lagi atas afidavit. Selain daripada mengenalpasti persoalan-persoalan fakta atau undang-undang, mahkamah harus mengambil langkah lebih untuk memastikan sama ada persoalan-persoalan ini boleh dibicarakan. Di mana persoalan yang ditimbulkan adalah persoalan undang-undang semata-mata tanpa rujukan kepada apa-apa fakta atau di mana fakta-fakta adalah jelas dan tidak boleh dipertikaikan, mahkamah hendaklah melaksanakan kewajipannya di bawah A 14. Sekiranya perkara undang-undang difahami dan mahkamah berpuas hati bahawa ia tidak boleh dihujahkan, mahkamah tidak dihalang daripada memberikan satu penghakiman terus, hanya kerana 'persoalan undang-undang adalah sepintas lalu satu yang kompleks dan oleh itu mengambil masa yang lebih untuk difahami'' (*Bank Negara Malaysia v Mohd Ismail & Ors* [199]2 1 MLJ 400) (lihat ms 687E–H).]

Notes

For cases on appeal against summary judgment, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4410–4431.

For cases on application of the parol evidence rule on the construction of the terms of a contract, see 3(2) *Mallal's Digest* (4th Ed, 2000 Reissue) paras 4026–4030.

For a case on construction of contract, see 3(2) *Mallal's Digest* (4th Ed, 2000 Reissue) para 3953.

Cases referred to

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400 (refd)

Cow v Casey [1949] All ER 197 (refd)

European Asian Bank AG v Punjab & Sind Bank [1983] 2 All ER 508 (refd)
Housing and Urban Development Co (Pte) Ltd v Mah Kok Weng & Anor [1984] 2 MLJ 16 (refd)
Telekom Cellular Sdn Bhd v Kabelect Sdn Bhd [2000] 3 MLJ 254 (refd)
Tan Chong & Sons Motor Co (Sdn) Bhd v Alan McKnight [1983] 1 MLJ 220 (refd)
United Malayan Banking Corp Bhd v Tan Lian Keng & Ors [1990] 1 MLJ 280 (refd)

Legislation referred to

Evidence Act 1950 s 94
Contracts Act 1950 ss 91, 92
Rules of the High Court 1980 O 14

KA Gan (*Lee Hishammuddin*) for the plaintiff.
Mohd Ariff (*Lee Tuck Onn* and *Wong Pei Ling* with him) (*Cheang & Ariff*) for the defendant.

Kang Hwee Gee J. : This is an appeal from the decision of the registrar dismissing the plaintiff's application for summary judgment under O 14 of the Rules of the High Court 1980.

The plaintiff's claim against the defendant was in respect of the exercise of a put option under a put option agreement which arose in the following manner:

1 Primal Vision Sdn Bhd Sdn Bhd ('the borrower') is a company incorporated under the laws of Malaysia with a registered address at M5-D5, Jalan Pandan Indah 4/1A, Pandan Arcade, 55100 Kuala Lumpur.

2 By a facility agreement dated 4 February 1997 ('the facility agreement'), the plaintiff granted to the borrower a term loan facility upon such terms and conditions therein contained, which was duly accepted by the borrower.

3 The facility agreement was secured, inter alia, by a charge of securities being 47.1m ordinary shares in Parit Perak Holdings Bhd ('the charged securities'), executed by the borrower in favour of the plaintiff.

4 By a put option agreement dated 4 February 1997 ('the put option agreement'), the defendant granted to the plaintiff, an irrevocable put option in consideration of the plaintiff granting the facility agreement to the borrower.

5 The terms of the put option agreement are, inter alia, as follows:

(a) the plaintiff may at any time, during the put option period and upon the occurrence of an event of default by the borrower, put to the defendant and require the defendant to purchase the charged securities from the plaintiff;

(b) upon exercise of the put option, the defendant shall be obliged to purchase from the plaintiff the charged securities;

(c) the purchase price of the charged securities shall be RM4.22 per share totalling RM198,762,000 ('the purchase price');

(d) the completion of the purchase shall take place on or before the 30th business day from the date of the exercise of the option as specified in the notice of exercise of option.

6 By reason of the failure of the borrower to make payment of all monies due and owing on the due date, an event of default has occurred as specified in the facility agreement.

7 By a notice dated 2 March 1998, the plaintiff exercised the put option requiring the defendant to complete the purchase of the charged securities for the purchase price on or before 14 April 1998, being the 30th business day from the date of the notice.

8 In breach of the put option agreement, the defendant has defaulted and/or failed and/or refused and/or neglected in completing the purchase of the charged securities within the prescribed time.

9 On the date of the breach, the market price of the charged securities was RM0.915 per unit and the total share value for the 47.1m shares was RM43,096,500.

(10) As a result of the breach, the loss suffered by the plaintiff is in the sum of RM155,665,500 particulars of which are as follows:

Particulars of Loss		
Contractual Price	=	RM198,762,000
Less	=	RM 43,096,500
Share value as at 14 April 1998		
Total Loss		RM155,665,500

The put option agreement — made simple

To decide on this application, first and foremost, one must comprehend the nature of the agreement that subsists between the plaintiff and the defendant.

Despite its quaint verbiage, essentially, the put option agreement that the parties had entered into was quite simply a form of security provided by the defendant to the plaintiff in consideration of the plaintiff agreeing to grant a credit facility of RM184m to the third party borrower called Primal Vision Sdn Bhd Sdn Bhd.

Under the put option agreement, the defendant agreed that in the event that Primal Vision Sdn Bhd Sdn Bhgd committed any of the events of default specified in cl 10 of the facilities agreement, it would purchase from the plaintiff the 47.1m Parit Perak Holdings Bhd shares which Primal Vision Sdn Bhd Sdn Bhd had charged to the plaintiff to obtain the facility at the agreed price of RM4.22 per share. For the purpose of the agreement, a notice in writing served by the plaintiff on the defendant of the occurence

of an event of default shall be conclusive evidence of the fact stated therein and shall be binding on the parties hereto.

An event of default had occured under cl 10(a) of the agreement in that the borrower had been unable to pay all monies due and owing to the plaintiff on the due date. Accordingly, the plaintiff had exercised the put option to require the defendant to purchase the shares having served on the defendant the requisite notice. The defendant had failed to buy back the 47.1m shares in consequence of which the plaintiff was forced under a term of the agreement, to sell them at a much lesser price, thereby incurring a loss of RM155,665,500, the sum the plaintiff is now claiming from the defendant.

That, essentially is the gist of the case for the plaintiff. In order that the present application may be properly appreciated however, it is necessary to set out the relevant textual provisions of both the put option agreement and the facility agreement which have to be referred to later.

Clause 1 of the put option agreement reads:

> For valuable consideration paid by the borrower to the grantor (the defendant in the present case) the receipt of which is hereby acknowledged by the grantor, the grantor hereby grants to the grantee (the plaintiff in the present case), an irrevocable put option ('the put option') whereby the grantee may at any time during the put option period (as defined herein) put to the grantor and require the grantor to purchase from the grantee the charged securities with all the rights attaching thereto as at the date of the notice of exercise of option (as defined herein) upon the terms and subject to the conditions herein appearing PROVIDED HOWEVER that the put option shall not be exercised unless and until an event of default as referred to in cl 10 of the facility agreement ('event of default') shall have occured. For the purpose of this agreement, a notice in writing by the grantee of the occurence of an event of default shall be conclusive evidence of the fact(s) stated therein and be binding on the parties hereto.

Clause 2 of the put option agreement reads:

> (a) The put option may be exercised by the grantee at any time during the put option period which shall be a period of one (1) month commencing on the next anniversary date of the facility agreement, or such further period as the grantor may agree upon in writing from time to time (hereafter referred to as ' the put option period')
>
> (b) Upon exercise of the put option, the grantor shall be obliged to purchase from the grantee all the charged securities as required by the grantee.

Clause 16 of the put option agreement reads:

> It is hereby agreed and declared that the facility agreement, the charge of securities and this agreement are, inter alia, instruments used in one transaction only, namely to secure the Facility in a maximum aggregate principle amount of Ringgit Malaysia One Hundred and Eighty Four Million (RM184,000,000) only together with interest, late payment/default interest, damages, fees and all other amounts of any kind or nature whatsoever payable or covenanted in or under or in relation to the facility and the facility agreement to be paid by the borrower to the grantee and for the purpose only

of the Stamp Act 1949, the facility agreement shall be deemed to be a subsidiary instrument.

Clause 10 of the facility agreement reads:

> 10.01 Events of Default: If at any time and for any reason, whether within or beyond the control of any party to this agreement any of the following events occurs then, at any time the lender shall by notice to the borrower declare that an event of default has occured and that all sums owing by the borrower shall have become due and payable:
>
> > Clause 10.1(h) Security Cover: The security cover referred to in s 7.04 (a) hereof is not maintained and the borrower shall have failed, refused or neglected to provide additional securities as required pursuant to s 7.06 hereof within any period specified by the lender.
> >
> > (Under cl 7.04 (a), the borrower is obliged to ensure that at all time during the currency of the facility, the outstanding amount under the facility should not exceed 85% of the value of the security charged).

Clause 7.05 of the facility agreement reads:

> Variation of security cover by lender: Notwithstanding anything to the contrary stated expressed or implied in this agreement, it is hereby expressly agreed that the lender shall be entitled at its absolute discretion, from time to time, to vary the security cover specified in s 7.04 hereof.

The defendant's grounds for opposing

That the loan of RM184m was granted to the borrower Primal Vision Sdn Bhd under a separate facility agreement between Primal Vision Sdn Bhd and the plaintiff was not disputed by the defendant. It was also not disputed that Primal Vision Sdn Bhd had effected the charge of the 47.1m shares to the plaintiff by a charge of securities.

Neither was it disputed that 'an event of default' had occured as alleged in para 8 of the statement of claim by reason of the failure of the borrower to make payment of all monies due and owing on the due date.

However, the plaintiffs application is opposed on two broad grounds by the affidavit of its executive director, En Mohd Nasir bin Ali which may be summarized as follows:

The put option agreement must be read as a 'composite whole' with the other agreements.

The facility agreement of RM184m which Primal Vision Sdn Bhd entered into with the plaintiff was secured by a number of interlocking arrangements/agreements as follows:

(a) a charge of securities dated 4 February 1997 between the plaintiff and Primal Vision Sdn Bhd Sdn Bhd (the borrower) underwhich the borrower charged to the plaintiff, inter alia, 47.1m shares in Parit Perak Holdings Bhd a company listed on the main board of the KLSE, the subject matter of the present put option agreement;

(b) a power of attorney dated 4 February 1997 executed in favour of the plaintiff by the borrower giving the plaintiff the right to deal with the charged securities;

(c) a letter of indemnity and guarantee dated 4 February 1997 executed by Tang Yong Kiat ('TYK'), guaranteeing the due and punctual payment by the borrower of outstanding amount due to the plaintiff;

(d) a memorandum of deposit of fixed deposit receipts dated 4 February 1997 for RM11.2m to be utilized for the serving of interest on the banking facility granted under the facility agreement.

In turn, the put option agreement is tied 'back to back' with the following agreements which the defendant had signed with other parties;

(a) a put option dated 4 February 1997 granted by Kemayan Corporation Bhd ('Kemayan put option') to the defendant under which Kemayan Corporation Bhd granted to the defendant an irrevocable put option whereby the defendant may at any time during the defined put option period put to Kemayan Corporation Bhd and require Kemayan Corporation Bhd to purchase from the defendant the charged securities provided that the Kemayan Corporation Bhd put option shall not be exercised unless and until the defendant has received the notice of exercise of option from the plaintiff herein under the KLCS put option;

(b) a personal guarantee from TYK dated 4 February 1997 under which TYK agreed to guarantee performance of the terms and conditions of the Kemayan Corporation Bhd put option and the payment by Kemayan Corporation Bhd of the share purchase price as defined in the Kemayan Corporation Bhd put option;

(c) a put option granted by merit capital ('merit capital put option') by way of further security for the Kemayan Corporation Bhd put option under which put option, merit capital granted to the defendant an option whereby the defendant may at any time during the defined option period, call upon merit capital to sell to the defendant 47.1m shares of Parit Perak Holdings Bhd at the price of RM1 per share. It was an express term of the put option that the option shall be exercised upon:

(i) the notice of exercise of option under the Kemayan Corporation Bhd put option has been served by the defendant on merit capital; and

(ii) Kemayan Corporation Bhd shall fail to pay the purchase price as defined in the Kemayan Corporation Bhd put option to the defendant.

The understanding or arrangement is also reflected in the Kemayan Corporation Bhd put option referred to above, in that it was expressed therein that the defendant has to be given an opportunity to require Kemayan Corporation Bhd to purchase the charged securities and to pay

the purchase price to the defendant to enable the defendant to fulfil its obligation to the plaintiff under the present put option.

All these agreements, it was contended, must therefore be read as 'a composite whole'. The defendant's liability under the put option agreement cannot therefore be enforced in isolation but 'back to back' to with the other agreements.

It was also alleged:

(i) that in the course of discussions before the defendant committed itself to sign the put option agreement, a Mr Robert Young of Nikkei Pacific Corporate Advisors Sdn Bhd, the person who negotiated the deal between the plaintiff and the defendant in this agreement, had repeatedly represented to the defendant's Managing Director En Nasir that the proposed put option was to operate 'back to back with the other transactions' as hereinbefore mentioned.

(ii) that before signing the put option agreement, a Ms Chan Mo Lin, the solicitor acting for the plaintiff had also made the same representation, to the effect that 'KLCS position was covered and that the aforementioned transactions were back to back' with the other agreements.

All these arrangements, it was contended, were known to the plaintiffs and the other parties. It was also known by all the parties concerned that defendant would not have been in a financial position to meet the put option it gave to the plaintiff 'in the absence of due performance by Kemayan Corporation Bhd and/or merit capital of the Kemayan Corporation Bhd put option and merit capital put option respectively'.

Since the purported exercise of the put option by the plaintiff, the defendant had commenced the appropriate action against the other parties and would be applying to consolidate them with the present action.

The legality of the exercise of the put option agreement by the plaintiff — the defendant discharged of its obligation under the KLCS put option

It was contended that an event of default under the facility agreement had occured earlier around the month of May 1997 when the margin of security cover that the borrower was required to maintain under cl 7.04 had fallen well below the required 85% which the borrower was obliged to maintain at all times. At the material time the price per share of the charged securities was at a fair and reasonable level relative to the price of RM4.22 per share which the defendant has to purchase under the present put option agreement. The plaintiff, it was contended, owed a duty to the defendant to act prudently to realize the charged securities at the best possible price in the light of the downturn in the Malaysian stock market beginning in the month of April 1997. It should have in that instance acted to declare an event of default under cl 10.1(h), recall the facility and realize the charged securities. In breach of that duty it had unlawfully delayed and failed to recall the facility granted to the borrower and initiate steps to realize the charged security until 2 March 1998 when the market price per share

had dropped to a mere RM0.915 compared to its price of RM4.12m on the date of the execution of the facility agreement and the put option agreement.

The plaintiff, it was contended, was also in breach of its duty to the defendant in failing to require the borrower to deposit additional or adequate securities when the value of the charged securities had fallen below the security cover of 85%.

Further, as a related issue, it was contended that the defendant had been misled by merit that the 47.1m Parit Perak Holdings Bhd shares would be available for call when the defendant exercised the put option against merit (under the merit call option agreement) when they were, in fact, not so available. It was contended that for this reason, the KLCS put option is tainted with illegality and is unenforceable.

In the event, the defendant maintained that it had been discharged from its obligation under the put option agreement. The plaintiff, it was contended, had acted inequitably, unconscionably, prejudicially and in bad faith against the defendant that the defendant should not be made to bear the consequence of the plaintiff's loss.

The plaintiff's affidavits in reply

By the subsequent affidavit of its managing director, the plaintiff denied that it had made any such representation or assurance to the defendant as alleged. The solicitor who drafted the put option agreement and the facility agreement and the charge of securities, Ms Chan Mo Lin had also, by her own affidavit denied making any such representation or assurance. In drafting the agreements she maintained that she was, in fact, acting for the borrower and not the plaintiff.

The first ground — the admission of extrinsic evidence — the parole evidence rule

The first ground involves the issue of whether extrinsic evidence can be allowed into the construction of the put option agreement. A brief review of the law that would have to be applied may be necessary.

The law in question is the parol evidence rule — which provides that where the parties appear to have embodied their agreements in a written document, extrinsic evidence cannot be admitted to add to, subtract, vary or contradict the terms and conditions which are embodied in the document itself.

This rule has found legislative acceptance in ss 91–92 of the Contracts Act 1950 ('the Act'), the meaning of which is better reflected in the passage in *United Malayan Banking Corp Bhd v Tan Lian Keng & Ors* [1990] 1 MLJ 280 at p 281, per Edgar Joseph Jr J (as he then was):

> In my opinion, the Evidence Act 1950, by s 91 excludes extrinsic evidence being adduced of the terms of a document by providing that no evidence may be given in proof thereof except the document itself and by s 92 an interdict is imposed on the admissibility of extrinsic evidence being adduced by the

> parties thereto in variance or in contradiction or in addition or in subtraction of the terms of a document.

A

But the rule has long been weathered down by exceptions (as the many provisions and explanations in s 92 of the Act indicate) that it may be difficult to decide with precision in some cases whether such extrinsic evidence may be admitted. For the present purpose however, a more accurate proposition of the law (in its common law form) is to be found in the English Law Commission restatement of the law as it appeared in its report, *Law Com 154, Cmnd 9700* (1986):

B

> When it is proved or admitted that the parties to a contract intended that all the express terms of their agreement should be recorded in a particular document or documents, evidence will be inadmissible if it is tendered only for the purpose of adding to, varying, subtracting from or contradicting the express terms of that contract.

C

The same sentiment was expressed by Salleh Abas FJ some three years before in *Tan Chong & Sons Motor Co (Sdn) Bhd v Alan McKnight* [1983] 1 MLJ 220 at p 229, in the following passage of his judgment:

D

> The expression 'When the terms of any such contract' at the beginning of s 92 must be read to mean 'When all the terms of any such contract'. *Damu Jadhao v Paras Nath Singh* [1965] 2 MLJ 38, at p 39.

In tandem with the proper interpretation that should be ascribed to ss 91 and 92 of the Act, the subsequent s 94 of the Evidence Act 1950 ('the EA') provides that:

E

> When a language used in a document is plain in itself and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts.

F

Section 94 of the EA was given the appropriate judicial pronouncement that it requires in the recent case of *Telekom Cellular Sdn Bhd v Kabelect Sdn Bhd* [2000] 3 MLJ 254, by Mokhtar Sidin JCA when he ruled on the conclusiveness and binding effect of a letter sent by the appellant to the respondent containing the words 'as full and final payment in satisfaction of the said judgment' and enclosing payment of the sums obtained against it in an O 14 application for summary judgment. This was what his Lordship (dissenting) said at p 509:

G

> The learned judge was of the view that the words used in the letter were of choice and select — plain and precise in its natural meaning, accurately applying the facts to the case. Therefore, the language being clear and exclusive, no extraneous evidence can be supplied or implied to the contrary or to bring about any other conclusion.

H

In a full trial, the question of whether or not the parties had intended that all the terms are to be included in a written document is a question of fact for the court to decide upon consideration of all the evidence relevant to this issue. *Chitty on Contracts, (Vol 1) General Principles* (1999 Ed) at p 12-096 (with footnotes reference to numerous English and Australian cases)

I

provides an authoritative guide on how to go about to evaluate whether the parole evidence rule will apply in a given case:

> It follows that the scope of the parole evidence rule is much narrower than at first sight appears. It has no application until it is first determined that the terms of the parties' agreement are wholly contained in the written document. The rule only applies where the parties to an agreement reduce it to writing, and agree or intend that the writing shall be their agreement. Whether the parties did so agree or intend is a matter to be decided by the court upon consideration of all the evidence relevant to this issue. *It is therefore always open to a party to adduce extrinsic evidence to prove that the document is not a complete record of the contract*. If, on that evidence the court finds that terms additional to those in the document were agreed and intended by the parties to form part of the contract, then the court would have found that the contract consists partly of the terms contained in the document and partly of terms agreed outside of it. The parole evidence rule will not apply. If, on the other hand, the court finds that the document is a complete record of the contract, then it will reject the evidence of additional terms.

But whereas in a full trial, the defendant is free to adduce evidence to prove that the put option agreement is not a complete record of the contract. In an O 14 application for summary judgement, the defendant is required to satisfy the court that there are extrinsic evidence which should be allowed to be proved in the trial the effect of which would provide the defendant with a viable defence to the plaintiff's claim.

The put option agreement, it is clear to me, is a highly formal, properly negotiated and professionally drawn up document by practitioners of law. It imposes upon the defendant the liability to pay out at its worst a very large sum of money should the borrower default on the loan and the plaintiff decides to exercise the option. Correspondingly, for the put option that it gave to the plaintiff, the defendant stands to gain a put option fee of 2% of the said sum — a hefty RM3.68m from the borrower.

It would be totally inconceivable in my view, that for a contract of such importance, the contracting parties would not have drafted into the put option agreement all the essential terms and conditions they had agreed upon with accuracy and certainty, so as to leave little or none to construction in the event of a dispute. Least of all it is inconceivable that they would have left unsaid those other terms and conditions they had orally agreed upon that would bind them. In the event, I would have to find that the agreement is conclusive of all the essential terms that would govern their contractual relationship at the time they signed it. It follows that any such pre-contract promises, representations and understandings, verbal or otherwise, whether made by Mr Robert Young, Ms Chan Mo Lin or by anyone else, even if true, are clearly extrinsic evidence which can never be allowed into evidence to add, subtract, vary or contradict the black and white terms and conditions of the put option agreement in a trial.

Having to exclude such extrinsic evidence, it follows that the parties would have to be bound by the terms embodied within the four corners of

the put option agreement read wherever necessary (by reason of cl 16 of the agreement), in conjunction with the facility agreement and the charge of securities.

In interpreting the put option agreement, it may be appropriate to recall for the purpose of guidance, what Wee Chong Jin CJ in the Singapore High Court case of *Housing and Urban Development Co (Pte) Ltd v Mah Kok Weng & Anor* [1984] 2 MLJ 16, said at p 18:

> In approaching the task of construction of the terms of a written agreement 'the common and universal principle ought to be applied; namely, that an agreement ought to receive that construction which its language will admit, and which will best effect the intention of the parties, to be collected from the whole of the agreement, and that greater regard should be had to the clear intention of the parties than to any particular words which they may have used in the expression of their intent' (see *Ford v Beech* (1848) 11 QB 852, 866; 116 ER 693). And, as no contract is made in a vacuum, in construing a term in a written agreement, a court must always have regard to its commercial purpose and the factual background against which it was made.

Having read the put option agreement and referring where necessary to the facility agreement and the charge of securities, it is clear to me that the parties had never intended that the put option agreement, is to be read (in so far as it concerns the obligation of the defendant) as a composite whole or back to back with the Kemayan put option, the merit call option or any other agreements which the plaintiff had entered into with any other parties pursuant to the facility agreement. It is also clear that there is no such provision that made the performance by the defendant of his obligation under the put option agreement conditional upon the performance of any other obligation by any other party in any other agreement. Viewed from the objective standpoint of the need of contracting parties in commercial contracts to define their rights and obligations with precision, had it been the intention of the parties that their obligations should be read subject to the conditions imposed in any other agreement, they would have been set out clearly in the put option agreement.

The only reason why reference is made in cl 1 of the put option agreement to the facility agreement, it is clear, is only for the purpose of fixing the liability of the defendant by defining the 'event of default' in the put option agreement and nothing more; and the reason why reference is made (in cl 3 of the preamble) to the charge of securities, it is clear, was merely for the purpose of identifying the securities which the borrower was required to deposit with the plaintiff and which the defendant was liable to purchase when the plaintiff exercised the put option.

It is true that the Kemayan put option agreement which the defendant signed with Kemayan Corporation Bhd does provide for Kemayan Corporation Bhd to purchase from the defendant the charged securities when the defendant received the notice of exercise of option from the plaintiff herein under the KLCS put option. But this is clearly a matter between Kemayan Corporation Bhd and the defendant and does not

involve the performance of the put option agreement that the defendant signed with the plaintiff.

Similarly, it is also true that under the merit call option agreement which the defendant entered with merit, the defendant may call upon merit to sell to the defendant 47.1m shares of Parit Perak Holdings Bhd shares at the base price of RM1 each if Kemayan Corporation Bhd fails to pay the purchase price of the charged securities under the Kemayan put option — again the matter is entirely between merit and the defendant.

It is evident that both the Kemayan put option and the merit call option agreements entered into by the defendant with the respective parties are meant to protect the defendant in the event that the plaintiff in the present case exercises the put option in the put option agreement to require the defendant to purchase the charged securities. But the obligation of the defendant to the plaintiff in the put option agreement is independent of the obligations of the parties to the defendant in the other agreements. It is a misnomer to say that in so far as the liability of the defendant is concerned, they operate back to back with the put option agreement — rather it is more accurate to say that both the Kemayan put option and the merit call option agreements ride on the back of the present put option agreement. The two agreements become operative upon the put option being exercised by the plaintiff in the put option agreement, but not vice versa. It follows that any corresponding claims that the defendant may have against Kemayan Corporation Bhd, merit capital or TYK arising from the exercise of the put option by the plaintiff have to be prosecuted and heard in other forums and not in tandem with the instant action by consolidation or otherwise.

Even assuming at its worst, that the Kemayan put option, the merit call option and the personal letter of indemnity and guarantee of TYK had embodied such adverse terms and conditions to bind the plaintiff, the same would still be unenforceable against it, as it was never a party to any of these agreements.

Much as the put option agreement appears to be factually related to other agreements which the plaintiff had entered into to provide it with the required level of security pursuant to the risks that it had to undertake in granting the loan facility to Primal Vision Sdn Bhd; and much as all these agreements are in turn related to yet another set of agreements which the defendant had signed with other parties to cover its own risk in granting the put option to the plaintiff, it is crystal clear that the liability of the defendant is independent of all these agreements.

In the event, I have to conclude that submission that the obligation of the defendant in the put option agreement cannot be read in isolation but in a composite whole with the Kemayan put option agreement, merit call option agreement and the personal guarantee of TYK is without substance and would not afford the defendant a fair or reasonable opportunity of setting up a defence in the event of a trial.

The second ground — legality of the exercise of the put option agreement

The second ground entails a critical examination of the contents of the put option agreement with respect to whether the plaintiff owe any duty to the defendant in the exercise of its right against Primal Vision Sdn Bhd under the facility agreement.

The mechanism that activates the defendant's liability under the put option agreement is well defined. An event of default had occured the conclusiveness of which had to be taken for granted by the issuance of a notice in writing dated 2 March 1998 pursuant to cl 1 of the said agreement. By the same notice, the plaintiff had also exercised its put option thereby rendering the defendant's obligation to purchase from the plaintiff the charged securities, that is to say the 47.1m Parit Perak Holdings Bhd shares, absolute.

The question of whether the plaintiff should have acted prudently to request the borrower to deposit additional securities, or if it had, whether the sums deposited were deemed sufficient to cover the shortfall when the value of the securities deposited fell below 85%, does not arise as the defendant was never a party to the facility agreement. There is accordingly, no duty on the part of the plaintiff to act in the interest of the defendant under the put option agreement to require the borrower to deposit additional securities, less so to ensure that the securities deposited were adequate.

With respect to the defendant's contention of being misled by merit in that the 47.1m Parit Perak Holdings Bhd shares were unavailable for call by the defendant when it exercised the put option under the merit call option agreement — again, this is a matter for the defendant to take up with merit.

The put option agreement, it is clear, does not impose upon the plaintiff the duty to recall the facilities from the borrower and to realize the charged securities when the price per share was at a reasonable level or any level. Clause 10 of the facility agreement listed 14 Events of Defaults — as diverse as the borrower failing to pay any sum due under the agreement, the borrower unable to pay its debt due to insolvency, a court judgement being obtained against the borrower etc. They cover all conceivable events meant to ensure due compliance of the terms and conditions of the facilities agreement by the borrower, Primal Vision Sdn Bhd. But it is clear that the clause imposes no duty on the plaintiff to act on any of the Events of Defaults mentioned therein. Whether or not the plaintiff would act on any of them is left entirely to its discretion to be exercised as and when the exigencies of commerce dictate — with the consequence that if the plaintiff does not act on any of the events of defaults that had occured, the omission would have to be treated at most, merely as a non event. To require the plaintiff to act immediately when a particular event of default occurs is to impose upon it a non duty and to deny it the flexibility to act in its best commercial interest.

But, even assuming that under the put option agreement, the plaintiff did owe such a duty to act in the interest of the defendant, the plaintiff could not have, in any case, acted on the default of the borrower in May 1997 (as

suggested by the defendant) to exercise the put option against the defendant and to realize the charged securities in the event, for under cl 2(a) of the put option agreement, the put option may be exercised by the plaintiff only during the defined option period, that is to say, within a period of 1 month commencing on the next anniversary date of the facility agreement — to be exact, only between the period 4 February and 3 March 1998. An exercise of the option after May 1997 but before 4 February 1998 would have constituted a breach of a fundamental term of the put option agreement on the part of the plaintiff.

Conclusion

By reason that all the agreements serve the primary purpose of providing a large credit facility to the borrower, Primal Vision Sdn Bhd, some textual cross references between these agreements may be unavoidable, with the consequence that some initial difficulty may be encountered in appreciating the nature of the liability of the defendant under the put option agreement. But that difficulty should not be an impediment to deny summary judgment to the plaintiff in this application, where the liability of the defendant has been clearly established.

For general guidance, it may be appropriate to recall what Mohd Azmi SCJ said in *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 at p 408 with respect to the duty of the court in hearing an O 14 application for summary judgment:

> Under O 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other on affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue as not triable. In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially under O 14 application. Thus, apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.
>
> Where the issue raised is solely a question of law without reference to any facts or where the facts are clear and undisputed, the court should exercise its duty under O 14. If the legal point is understood and the court is satisfied that it is unarguable, the court is not prevented from granting a summary judgment, merely because 'the question of law is at first blush of some complexity and therefore takes a little longer to understand' (see *Cow v Casey* [1949] All ER 197; and *European Asian Bank AG v Punjab & Sind Bank* [1983] 2 All ER 508 at p 516).

The decision

The put option having been legally exercised, the defendant was liable to purchase the 47.1m Parit Perak Holdings Bhd shares at the agreed price of RM4.22 per share from the plaintiff, pursuant to cl 1 of the put option

agreement. Having failed to do so the plaintiff was at liberty to realize them in the open market and claim the shortfall from the defendant.

The appeal against the registrar's decision is allowed with costs.

There shall be an order in terms of the application.

Appeal allowed.

Reported by Benjamin Yong